IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1769

JOSEPH H. LIBERMAN,
Petitioner,

v.

CITY OF ST. LOUIS,
Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Missouri

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In Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Missouri

Comes now the City of St. Louis, a municipal corporation of the State of Missouri, Respondent herein, and respectfully makes its response to Petitioner's Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri.

OPINIONS BELOW

Respondent accepts Petitioner's statement of the Opinion below, and agrees that said Opinion as reproduced in Appendix A, page A-1 of Petitioner's Brief is an accurate reproduction of the Opinion of the Missouri Supreme Court, En Banc, in the case of *City of St. Louis v. Joseph H. Liberman*, which appears at 547 S.W.2d 452.

JURISDICTION

Respondent accepts Petitioner's statement of Jurisdiction.

QUESTIONS PRESENTED

The questions presented for review are as follows:

1. Whether the inspection of petitioner's records in a non-public business area of petitioner's pawnshop by police officer-employees of respondents constituted a "warrantless search," and, if so, whether said action violated petitioner's right to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution.

2. Whether Ordinance 55784 is unconstitutionally vague, doubtful and uncertain in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

3. Whether the business of pawnbroking is a reasonable area of classification for regulation, in view of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

4. Whether Ordinance 55784 compels the taking of petitioner's property without compensation, notice and opportunity for hearing, and, if so, whether said taking violates petitioner's rights pursuant to the Fifth and Fourteenth Amendments of the United States Constitution.

5. Whether Ordinance 55784 and police inspections made pursuant thereto violate the rights of petitioner and his customers to privacy as guaranteed by the Fourth, Fifth and Fourteenth Amendments of the United States Con-

stitution, and whether petitioner has standing to raise this issue on behalf of his customers.

6. Whether Ordinance 55784 violates the prohibition against involuntary servitude contained in the Thirteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent accepts petitioner's statement of the constitutional provisions and statutes involved herein.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case with the following additions.

Glennon O'Connor, a detective with the St. Louis Police Department, testified that he was assigned to the pawnship section and routinely checked the books of all pawnshops for stolen property with or without specific complaints (Tr. 31-32). O'Connor stated that he and Detective Corporal Lawrence Judge made up the pawnshop detail and that they went to the Easton Loan Company on November 18, 1974, to check the books for all loans made within the last month and a half since their last visit (Tr. 32-33). O'Connor stated that he found a saxophone serial number in the book which corresponded with one which was listed in his records as lost or stolen (Tr. 34). The pawn register was marked seized, Judge put his initials, the department, and the date in the book, and then they informed the appellant they were seizing the saxophone (Tr. 34). The officers then left (Tr. 37).

A few days later the officers returned with a warrant and advised the appellant he was under arrest for failing to take a

photograph and for failing to obtain proper identification. (Tr. 37). O'Connor stated that the pawn register only contained the name and address of the customer plus the transaction without any reference to age, motor vehicle or chauffeur's license or social security number (Tr. 38). O'Connor also asked the appellant to produce a photograph of the transaction but the appellant stated there was no film in the camera (Tr. 40. O'Connor identified Ordinance No. 55784 as the one he was operating under at the time he arrested the appellant.

O'Connor stated that he did not have a search warrant on November 18, 1974 (Tr. 45). He testified that Sol Davis, an employee, let them behind the counter on that day (Tr. 47). The officers did not ask for permission to come behind the counter but informed the employee that they were there to check the books (Tr. 48). Several months before they had been denied access behind the counter (Tr. 49) by the appellant who told them to check the books in the public area in front of the counter (Tr. 51). The officers, on that occasion, refused to check the books in the public area of the store (Tr. 52). O'Connor denied that the officers had ever threatened the appellant with arrest if he refused to allow them behind the counter (Tr. 225).

O'Connor said that an entire cannister of film had been seized from the appellant (Tr. 59). He stated that if the report of lost or stolen property comes from another police force, the picture of the customer is sent to that force (Tr. 61).

O'Connor stated that when items are seized the pawn-broker is shown the serial number and complaint number in the officer's records and later is given a receipt (Tr. 65). The victim is then notified and is given the item after furnishing proof of ownership and signing a receipt (Tr. 62). There is no reimbursement to the pawnbroker for the property (Tr. 62). The photographs required by the ordinance play no role in the recovery of property and only serve to assist in apprehending

thieves (Tr. 72-73). The City of St. Louis did not reimburse pawnshops for the cost of renting a camera, film, and developing (Tr. 77).

Lawarence E. Judge, a member of the pawnship squad, testified that he had never applied for a search warrant prior to making inspections of pawnshops and did not have one on November 18, 1974 (Tr. 154). He claimed that he asked for permission to go behind the counter on November 18, 1974, and did not encounter any opposition (Tr. 163). He also confirmed that the appellant, on one prior occasion, had instructed the officers to examine the books in the public area of the store (Tr. 164). Judge testified that he and his partner had picked up a full cannister of film from the Easton Loan Company and had never returned it (Tr. 160-161). He stated that the photographs play no role in the recovery of stolen property but assist in the investigation (Tr. 159) and help to track down a thief (Tr. 163).

Joseph Liberman, the president of Easton Loan Corporation, Inc. (Tr. 167), was arrested by officers O'Connor and Judge of the pawnshop (Tr. 168, 170). He testified that the officers were not given permission to come behind the counter on November 18, 1974 (Tr. 174). The officers have told him that the Supreme Court has said they don't need his permission to come behind his counter even though he wants them to examine the books on the public side of the counter (Tr. 189). The officers told the defendant he would be arrested for interfering with their duty if he didn't permit them to go behind the counter (Tr. 190). Liberman stated that his employee, Sol Davis, did not have his authority to grant permission to the officers to come behind the counter (Tr. 190).

Liberman testified that, on November 18, 1974, the officers did not exhibit a search warrant and had never exhibited one (Tr. 188). The officers, on November 18, 1974, told the clerk there was a stolen saxophone and never returned it or reimbursed

him for the twenty-five dollars he paid out as a loan on it (Tr. 175). Liberman stated that he is never told what happens to seized articles (Tr. 194). The officers did make an entry in his book when the saxophone was seized and later gave him a receipt (Tr. 215). Liberman, on numerous occasions, had requested the officers to give him a list of stolen property so that he would not make loans on those items, but no list was ever provided (Tr. 191).

Liberman stated that he had never been able to locate a picture of the person who pawned the saxophone and does not know if a picture was taken (Tr. 181). He stated that if no picture was taken, it was not intentional (Tr. 181). He testified that there was film in the camera at the time of the transaction and the camera was used regularly (Tr. 208). Liberman denied telling the officers that there was no film in the camera at the time of the transaction (Tr. 208). Other pictures on that roll developed (Tr. 209), but there was a problem taking pictures because of the lighting (Tr. 210) and the security bars (Tr. 177).

Liberman stated that his customers had complained about having their pictures taken and he had lost business to a pawnshop in Wellston (Tr. 187). A sign in his shop also advised customers that the pawnshop was required by law to take the photographs of its customers (Tr. 214). Liberman testified that he has had to rent a camera for five years at a monthly rental of fifteen dollars and had spent approximately nine hundred dollars (Tr. 182). A cannister of film has two thousand negatives and costs fifteen dollars, including the developing (Tr. 182). One cannister is used a month and the approximate cost for film and developing for five years was nine hundred dollars (Tr. 183). It also required time to take the film out of the camera and arrange for its developing (Tr. 199). Liberman testified that he gives the photographs to the police officers upon request (Tr. 184). In August of 1974 the police seized a cannister with approximately 1500 pictures on it and never returned it (Tr. 184). In March of 1975 another cannister with approximately 500 photographs was seized and not returned (Tr. 185-186). The officers did not demand a specific photograph on those occasions (Tr. 184, 186).

Liberman complained that Judge, a large man, would always position himself between the counter and a file cabinet in such a way as to disrupt his business (Tr. 179-180). The officers would come in every couple of months and stay for three to four hours (Tr. 203).

ARGUMENT

I

The issue raised by petitioner with respect to an alleged "warrantless search of the non-public business area of Petitioner's pawnshop" is an inappropriate question for review by certiorari for the following reasons:

To grant certiorari on this issue would be to exert jurisdiction merely to review a decision of a state court upon a question of fact. *Grayson v. Harris*, 267 US 352, 69 L.Ed. 652, 45 S.Ct. 317 (1932); *Portland R. Co. v. Railroad Commission*, 229 US 397, 57 L.Ed. 1248, 33 S.Ct. 820 (1913).

The finding of the Missouri Supreme Court upon the record was that the police officers involved made no search of any area of petitioner's pawnshop—but, rather, merely inspected petitioner's records, pursuant to the provisions of the ordinance, while seated in the non-public business area of the shop, and with the "tacit" consent of petitioner's employee.

In short, the Missouri Supreme Court found that there had been no search. The "tacit" consent, assailed by petitioner as inadequate under *Bumper v. California*, 391 US 543, 20 L.Ed. 797, 88 S.Ct. 1788 (1968), was not tacit consent to a search, but merely tacit consent to the officers' sitting in a non-public area while examining petitioner's records.

To grant certiorari on this issue would, further, be to exert jurisdiction in a situation where the challenged law is of narrow application and affects only a very limited class of persons. The law in question is a city ordinance, applicable only within the geographical boundaries of the City of St. Louis. Even within those boundaries, the only persons affected by the ordinance are pawnbrokers. Thus the case would seem to lack

the element of "national import," frequently cited as being a consideration of major significance in the granting of certiorari.

Indeed, this issue—the lack of widespread import—applies to all of petitioner's arguments. Because the ordinance is so narrowly-drawn and limited in its application, it would seem to be inappropriate for review by certiorari.

Even if the court were to determine that a warrantless search occurred in the instant case, the decision of the Missouri Supreme Court in upholding such an action is not necessarily in conflict with prior decisions of the United States Supreme Court.

On the contrary, a similar situation exists with respect to the Gun Control Act of 1968, 18 USCA § 923(g), which authorizes official entry during business hours into the premises of any dealer, importer, manufacturer or collector to inspect firearms and records. It is noteworthy that pawnbrokers are classified as dealers under this Act. In *United States v. Biswell*, 406 US 311, 32 L.Ed.2d 87, 92 S.Ct. 1593 (1972), an inspection without warrant made pursuant to this Act was held to be reasonable official conduct under the Fourth Amendment prohibition against unreasonable search and seizure, and, since such a search was based on the authority of a valid statute, the lawfulness of the search did not depend on the consent of the defendants.

II

Certiorari is unwarranted for review of the Missouri Supreme Court's decision as to whether certain provisions of Ordinance 55784 are unconstitutionally vague inasmuch as the court, in holding that the ordinance was not thus violative of due process, stayed well within the guidelines set forth by this court for determining whether or not an ordinance is so vague as to fail to provide an ascertainable standard of guilt.

Bayce Motor Lines v. United States, 342 US 337, 96 L.Ed. 367, 72 S.Ct. 329 (1952, cited by petitioner in support of his argument on this point, contains perhaps the best explanation of respondent's position. In *Bayce, supra*, this court said:

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties . . . But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." (342 US 337 at 341).

The words in Ordinance 55784 complained of by petitioner —"proper camers," "law enforcement officer," and "a full description of such property"—are words for which "the practical necessities of discharging the business of government" demand a certain flexibility.

From a common sense viewpoint, to be more specific than "proper camers" would be to place an unnecessary burden upon pawnbrokers to purchase or lease a specific type of camera. To make "a full description of such property" more definite would be to set up requirements which pawnbrokers might not be able to fulfill, given the extraordinarily wide variety of items which pass daily through a pawnshop.

"Law enforcement officer" is a term which has been defined and redefined by both state and federal courts, and is one of those terms to which common usage gives a definite meaning and understanding.

III

Certiorari should not be granted with respect to petitioiner's argument that Ordinance 55784 is a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Constitution of Missouri, 1945, because the ordinance falls well within the scope of prior decisions of this court in similar cases.

Petitioner's primary argument on this point is that Ordinance 55784 creates an allegedly unreasonable classification for the regulation of pawnbrokers, by virtue of the fact that the requirements of the ordinance do not extend also to junk dealers, second-hand shops and antique businesses.

It is well-settled that a State has wide discretion to create classes in the adoption of regulations under its police power, provided only that the classifications have reasonable bases, are not arbitrary and do not give rise to invidious discrimination. *Morey v. Dowd*, 354 U.S. 457, 1 L.Ed.2d 1485, 77 S.Ct. 1344 (1957). Further, such a classification will be sustained if any state of facts reasonably can be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961).

The highest courts of a large number of states, in cases too numerous to cite herein, have held that pawnbrokers constitute such a reasonable classification, and, further, that pawnbroking is that type of activity which warrants the strictest regulations, by virtue of the fact that the nature of the occupation lends itself to exploitation by criminals. See Am. Jur. 2d Moneylenders and Pawnbrokers, Sections 3 and 5; 125 ALR 598, Annotation.

Thus, with the great weight of state court decisions holding that the pawnbroker's business is an individual area which can reasonably be classified as an area for regulation, the question

becomes: Must such a classification, then, in order not to be arbitrary, also include all other types of activities which could conceivably lend themselves to the same evils as does the pawnbroking business.

The answer, of course, is no. It is well-settled that a classification is not rendered arbitrary merely because it is under-inclusive. The regulating legislative body can and must be free to tackle a problem one step at a time, dealing first with those areas where the need is most urgent. *Williamson v. Lee Optical*, 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461 (1955).

Still another reason for denying certiorari on this particular point is that to do otherwise would be to exert jurisdiction to review a finding of fact. The Supreme Court of Missouri specifically found that:

> ". . . [A]part from defendant's assertion that junk dealers, secondhand shops, etc., are businesses similarly situated to pawnshops, there is little, if any, evidence in the record to support the proposition that these businesses are at all comparable. . . ." *City of St. Louis v. Joseph H. Liberman*, 547 SW2d 452 (1977) at 458.

IV

Review on the issue of whether the provisions of Ordinance 55784 constitute a taking without compensation or opportunity for hearing is unwarranted in that, again, it would be an exertion of jurisdiction for reviewing a finding of fact by the highest court of a state.

Although the Supreme Court of Missouri did not deal specifically with this issue in *City v. Liberman*, 547 S.W.2d 452 (1977), it did let stand its decision in the case of *Liberman v.*

Cervantes, 511 S.W. 2d 835 (1974), a declaratory judgment action, dealing with essentially the same issues.

In *Liberman v. Cervantes, supra*, the court found, based on cost figures produced at a hearing, that:

> "Appellant has failed to demonstrate that the additional cost of doing business imposed by the requirement of photographs is confiscatory, prohibitive, or that it constitutes the taking of property without due process of law. . . ." (511 S.W. 2d 835 at 839).

V

Certiorari is not warranted to review petitioner's argument that the requirements of Ordinance 55784 that he take and make available to police officers photographs of his customers and certain detailed records, constitutes an invasion of privacy.

With respect to petitioner's assertion that his own privacy is invaded thereby, it is difficult to see how he can claim such an interest in photographs and documents which he maintains *only* because the law requires him to do so. The claim is particularly ludicrous in that the ordinance requires that these documents and photographs be maintained specifically so that they can be made available to police officers, both for preventing crime and apprehending criminals.

Essentially, petitioner is attempting to assert a right to privacy in that which is not actually his own—a right to be free from unwarranted governmental intrusion with respect to records he maintains only because the government, for its own purposes, requires him to do so. Again, the analogy of *United States v. Biswell*, 406 U.E. 311, 32 L. Ed. 2d 87, 92 S. Ct. 1593 (1972) is applicable. The threat to privacy is minimal in light of the overriding governmental interest in crime prevention.

With respect to petitioner's assertion that the right of his customers to privacy is violated, petitioner should not even be permitted to raise the issue, inasmuch as his customers could not do so, having effectively waived their right to complain.

In addition to its other requirements, Ordinance 55784 requires that petitioner conspicuously post a notice advising his customers of the photograph provisions of the ordinance. Thus, customers who choose to do business with petitioner are fully aware of the situation and, by transacting their business with petitioner despite the requirement of photographs, effectively waive their right to complain thereof subsequently.

VI

With respect to a determination of the issue of whether Ordinance 55784 requires involuntary servitude in violation of the Thirteenth Amendment to the United States Constitution, certiorari should not be granted inasmuch as petitioner's contention is frivolous, shows a total lack of comprehension of the intent and scope of the amendment, and, in short, is an attempt to distort a concept which has been well-delineated by this court on innumerable occasions.

The Thirteenth Amendment was intended to deal with ". . . those forms of compulsory labor akin to African slavery. . . ." *Butler v. Perry*, 240 U.S. 328 at 332, 60 L.Ed. 672, 36 S.Ct. 258 (1916). Unquestionably, the distinguishing feature of African slavery was that those who were forced to engage in that particular "occupation" had absolutely no opportunity to choose whether or not they wished to do so.

Petitioner, on the other hand, does not—and cannot—assert that he was snatched from his mother's arms and physically compelled to be a pawnbroker. On the contrary, petitioner voluntarily chose to engage in an occupation which he knew, for many years prior to his entry therein, had been the subject of the most stringent of state regulation.

CONCLUSION

Respondents respectfully pray this honorable court to deny petitioner's petition for writ of certiorari, inasmuch as: 1) said petition asks the court to consider issues of limited import and narrow application; 2) said petition, with respect to many of its arguments, seeks review of the findings of the highest court of a state with regard to questions of fact, and 3) said petition sets forth claims which are opposed to settled principles of law, said principles having been faithfully applied by the Missouri Supreme Court in its judgment and opinion.

Respectfully submitted,

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